CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 249.

THE UNITED STATES, APPELLANT,

vs.

AUSTIN NICHOLLS & COMPANY.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED FEBRUARY 11, 1901.

(19050.)

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1 United States circuit court of appeals, second circuit.

Present: The Honorable William J. Wallace, the Honorable E. Henry Lacombe, the Honorable Nathaniel Shipman, circuit judges.

THE UNITED STATES, APPELLANT,
vs.
AUSTIN NICHOLLS & COMPANY, APPELLEES.

Certification of questions to the Supreme Court, under the act of March 3, 1891.

This cause came before this court upon appeal from a decision of the circuit court, southern district of New York, reversing a decision of the Board of General Appraisers which affirmed the action of the collector of the port of New York relating to the assessment of duty on certain imported merchandise.

As to a certain question of law arising therein, this court desires the instruction of the Supreme Court for its proper decision.

2 STATEMENT OF FACTS.

The importation was under the tariff act of 1894, and consisted of glass bottles holding not more than one pint and filled with goods dutiable at ad valorem rates.

QUESTION CERTIFIED.

Upon the facts set forth the question of law concerning which this court desires the instruction of the Supreme Court for its proper decision is:

"Should the value of the bottles filled with ad valorem goods be added to the dutiable value of their contents under section 19 of the customs administrative act of 1890, to make up the dutiable value of the imported merchandise?"

In accordance with the provisions of section 6 of the act of March 31, 1891, establishing courts of appeal, etc., the foregoing question of law is by the circuit court of appeals for the second circuit hereby certified to the Supreme Court.

W. J. WALLACE,
Circuit Judge.

E. HENRY LACOMBE,
Circuit Judge.

N. SHIPMAN,
Circuit Judge.

3 *United States of America, second circuit, ss:*

I, William Parkin, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing certificate in the case entitled The United States against Austin Nichols & Company, was duly filed and entered of record in my office by order of said court on the 7th day of February, 1901, and as directed by said court the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said United States circuit court of appeals for the second circuit, this 7th day of February, 1901.

[SEAL.] WM. PARKIN,
Clerk of the United States Circuit Court of Appeals
for the Second Circuit.

4 (Indorsed:) United States circuit court of appeals, second circuit. The United States vs. Austin Nicholls & Company. Certificate to Supreme Court. United States circuit court of appeals, second circuit, filed Feb. 7, 1901. William Parkin, clerk. Office Supreme Court of U. S., received Feb. 8, 1901.

(Indorsement on cover:) (Certificate.) File No. 18050, U. S. C. C. of appeals, 2nd circuit. Term No. 249. The United States, appellant, vs. Austin Nicholls & Company. Filed February 11, 1901.

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No. 249.

Brf. of Atty. Gen'l. (Knapp, Wickersham & Davis for)

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FILED
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Filed Apr. 26, 1902.

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

THE UNITED STATES, APPELLANT,
v.
AUSTIN NICHOLS & Co. } No. 249.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

THE UNITED STATES, APPELLANT,
v.
AUSTIN NICHOLS & CO.
No. 249.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This case involves the dutiable classification of certain glass bottles under the tariff act of 1894. The stipulation in the circuit court of appeals shows that the bottles in question hold not more than 1 pint, were imported filled with merchandise, which was liable to ad valorem duties, and were assessed for duty at the respective ad valorem rates applicable to their contents as a part of the value of the same. The protest claimed that the articles are free of duty on the ground that the words, "whether filled or unfilled, and whether their contents be dutiable or free," in paragraph 88 of the act, do not refer to these articles, undertaking to justify this claim by an untenable appeal to executive practice and section 2898,

Revised Statutes; and on the further ground that paragraph 248, taxing ginger ale or ginger beer at 20 per cent ad valorem, without "separate or additional duty * * * on the bottles," exempts bottles containing those beverages. The protest made the alternative claim that if not free of duty, the articles are dutiable at 40 per cent ad valorem under the last clause of paragraph 88 or under paragraph 89 or 90. As the protest is not in the record, I quote the portion which makes this claim, viz:

> It is further claimed as to such of said articles as have been assessed with a duty amounting to more than 40 per cent ad valorem, that if not free of duty, or dutiable as aforesaid, they are dutiable at only 40 per cent ad valorem under the last part of said paragraph 88 as "glassware," or under paragraph 89 or 90 of the same act.

The words "or dutiable as aforesaid" appear to refer to other articles embraced in the earlier stages of this proceeding.

The Board of General Appraisers, in an unpublished decision, found that the articles were treated by the collector as the usual coverings of the merchandise contained, and were improperly assessed as part of the same under section 19 of the customs administrative act, and sustained "the protest claiming that the bottles containing 1 pint or less were dutiable at 40 per cent ad valorem, under the last part of said paragraph 88," citing *In re Grace*, 79 Fed. Rep., 315, and G. A., 3964.

The petition on appeal made the following assertion:

> The protest in question made no claim that a duty of 40 per cent ad valorem should be assessed on said bottles, etc., and the Board of Appraisers exceeded their powers in ordering a reliquidation to that effect.

The record in the case below does not sustain this assertion. As just pointed out, the importers' protest made the alternative claim that 40 per cent ad valorem was the proper tax under the last part of paragraph 88 or under paragraph 89 or 90. The query here arises whether if one claim of the importers has been sustained, they are in a position to appeal and may abandon that claim and urge on appeal their extreme claim.

It has been decided that one party can not take advantage of another party's appeal, (*United States* v. *Lies*, 170 U. S., 628). For similar reasons a party who has really exhausted his appeal because on one ground of complaint he has been sustained, should not be permitted to carry further another and extreme claim on which he has failed. Let the importer stand on a single claim, or else accept a favorable result on one of several claims, even if less advantageous than such a result on his main claim. He should be compelled to shoulder the burdens with the advantages of alternative or multiple grounds of protest. It must be said, however, that the importer's right to take this course was sustained in *Koechl* v. *United States* (91 Fed. Rep., 110).

The circuit court reversed the board as to the articles before the court, and decreed that—

> All filled bottles or vials holding not more than 1 pint are exempt from duty irrespective of the nature or dutiable character of their contents.

On appeal by the United States to the circuit court of appeals, that court certified here the following question:

> Should the value of the bottles filled with ad valorem goods be added to the dutiable value of their contents, under section 19 of the customs administrative act of 1890, to make up the dutiable value of the imported merchandise?

Several similar cases were argued below with the present one, but no testimony seems to have been taken in any of them.

Thus it appears that besides the question of procedure, or of the limitation of the right of appeal, sufficiently raised by the third and general assignment of error below, viz: "In that it [the circuit court] did not in all things affirm the decision of the board," etc, the case involves a settlement of classification between—

(1) The application of section 19 of the customs administrative act, which assesses duty when ad valorem on market value or wholesale price, "including the value of all cartons, crates, boxes, sacks, and *coverings of any kind.*" This was the collector's classification.

(2) Paragraph 88 of the Wilson Act, taxing "* * * glass bottles holding more than one pint, * * *

whether filled or unfilled, and whether their contents be dutiable or free, * * * and vials holding not more than one pint and not less than one-fourth of a pint, one and one-eighth cents per pound; * * * *all other plain green and colored, molded or pressed, and flint lime and glassware, 40 per cent ad valorem.*" The Board of General Appraisers classified the articles under the last clause.

(3) The claim that these bottles are not subject to any duty, because bottles holding not more than 1 pint and imported filled are not dutiable under paragraph 88 aforesaid, and filled bottles are not within the intent or meaning of section 19 of the customs administrative act. This was the importers' extreme claim, to which there were alternatives, as pointed out, and one of the alternatives had been sustained by the board.

Now, although the question certified brings only a particular aspect of the case before the court, since the assignments of error below stand especially on paragraph 88 of the act of 1894, I presume it will be proper to state the argument on all branches of the case as an aid to the proper reply to the circuit court of appeals. Indeed, it is the question of that court which has brought back into the case, so to speak, the original classification of the collector under section 19 of the customs administrative act.

ARGUMENT.

I.

AS TO SECTION 19 OF THE CUSTOMS ADMINISTRATIVE ACT.

There can be no doubt that bottles are coverings, and the usual coverings, of their contents. The Government does not contend that they are dutiable under section 19 as unusual forms of coverings which are to be subjected to an additional duty whether the contents are dutiable or free. Being the usual coverings, then, they must be dutiable under section 19 on their value added to the value of the contents, whatever they may be, and at the same rate as the contents, unless other provisions of law specifically subject them to duty or clearly exempt them from duty. Section 19 (so far as regards *usual* coverings) only applies to the coverings of merchandise subject to an ad valorem rate of duty, and the question certified and the stipulation below show that such was the character of the merchandise here.

In *United States* v. *Dickson* (73 Fed. Rep., 195) the court said: "Ordinarily, bottles may properly be considered as coverings of their contents and treated accordingly." And in *United States* v. *Ross* (91 Fed. Rep., 108) similar filled bottles were held to be usual and necessary coverings.

The Government does not now contend that bottles holding 1 pint or less and containing ginger ale are dutiable as coverings, because paragraph 248 of the act of 1894, assessing a duty of 20 per cent on ginger ale, provided that no separate or additional duty

shall be assessed on the bottles. This was a special exemption, and the Government acquiesced in the decision in the Dickson case, holding, in effect, that to add the value of the bottles to the value of the goods, under section 19, was assessing an additional duty in the face of the prohibition of paragraph 248. Another instance of a similar exemption is seen in paragraph 244, as to still wines, containing the clause "but no separate or additional duty shall be assessed on the bottles or jugs."

Nor does the United States resist the decision in *United States* v. *Ross* (91 Fed. Rep., 108), holding that similar bottles were free of duty, the beverage contained being on the free list. But we do contend that where there is no special exemption, as in the ginger ale case, and where the contents of the bottles are subject to an ad valorem duty, they are properly dutiable under section 19.

If these bottles are usual coverings and contain goods free of duty or subject to a specific rate (*United States* v. *Leggett*, 66 U. S., 300), or if the bottles are specifically exempted, they are free; but otherwise, and if they contain ad valorem goods, they are dutiable at the rate assessed upon their contents; their value constitutes a part of the dutiable value of the goods. It is not too much to say that even if the bottles are not coverings (which can hardly be contended), their value must, under section 19, be included in the "expenses incident to placing the merchandise in condition, packed ready for shipment to

the United States." In short, if pint bottles containing free goods are free as the usual coverings of such merchandise, it is difficult to see why similar bottles containing ad valorem goods should not be treated as usual coverings also and be dutiable accordingly.

In *Merck* v. *United States* (99 Fed. Rep., 432) the report seems to be inaccurate, as the second clause of the syllabus obviously should read, "bottles holding *not* more than 1 pint of merchandise, subject to an ad valorem duty, are not themselves subject to duty." There is a corresponding error in the body of the opinion, which certainly intended to attribute the importer's admission of dutiability, under paragraph 88, to bottles holding *more* than 1 pint rather than to bottles holding *not* more than 1 pint. But, taking the correct form of the syllabus statement as suggested, we contend that Judge Townsend is mistaken in saying that the Ross and Dickson cases sustain the contention that pint bottles holding ad valorem merchandise are not themselves subject to duty, for the Dickson case held this view only because of the special exemption applicable to ginger ale, and the Ross case followed that view simply because the soda water contained was on the free list.

The development of the statutes as to coverings is as follows:

Section 24 of the act of June 30, 1864 (13 Stat., 202), provided that the actual value of the goods was to be ascertained by adding the value of the covering. This section was repealed by the act of March 3, 1865

(13 Stat., 491), but was restored by section 9 of the act of July 28, 1866 (14 Stat., 328), and the latter section was incorporated into the Revised Statutes as section 2907, and continued in force until repealed by section 7 of the act of March 3, 1883 (22 Stat., 488). Section 19 of the customs administrative act restored the provisions of the act of 1864, but limited the inclusion of the value of coverings in the value of the goods to cases where the goods are subject to an ad valorem duty. This is, of course, the reason why coverings are claimed to be free of duty so far as section 19 is concerned when the duty is specific.

Thus it appears that the rule of section 19 is an established principle in customs statutes, and unless and so far as the later tariff act of 1894 expressly exempted such articles, or explicitly or by necessary consequence subjected them to a different assessment of duty, section 19 must include them. The argument that bottles, although coverings, had always been provided for *eo nomine* in tariff acts is subject to the qualification that the question depends upon the tariff act in force at the time. The acts of 1883 and 1890 might by reason of their explicit terms cover any given bottles as coverings, but under the act 1894 that question would depend upon the terms used. Certainly, if articles are not covered *eo nomine*, although previously so covered, the claim that they are free of duty on this ground is not to be commended when there is a general provision of law in force at the time apt and sufficient to cover them. Under the tariff of

1883, paragraphs 133 and 134, there was a duty of 30 per cent ad valorem on green and colored glass bottles and vials, if filled and not otherwise provided for; and a duty of 40 per cent ad valorem under the same conditions on flint and lime glass bottles and vials. Under the act of 1890, paragraphs 103 and 104, the duty became specific and the distinction of capacity appeared, the duty being higher on the containers of less capacity; and where filled and the contents subject to ad valorem duty, the value of the bottles, etc., was to be added to the value of the contents. The various vessels were dutiable as if empty, unless otherwise provided for, a minimum rate of duty, however, of 40 per cent ad valorem being imposed. Paragraph 88 of the act of 1894 undertook to combine paragraphs 103 and 104 of the act 1890, but left the real meaning and intent somewhat ambiguous, while paragraph 99 of the act of 1897 cleared up the ambiguities.

A consideration of all these provisions makes it plain, I think, that bottles not expressly relieved of duty have always been taxed, even when filled, so far as the intention of Congress is concerned, whether their contents were dutiable or free, and whether the duty on the contents was ad valorem or specific. So that even if the effect of judicial decisions has been to relieve certain filled bottles, notwithstanding this general intent, the argument is strong that the application of the coverings provision of section 19 to the bottles here is in accordance with this intent and should be applied.

This leads to a more careful consideration of section 88 of the tariff act of 1894.

II.

AS TO PARAGRAPH 88 OF THE TARIFF ACT OF 1894.

There are certain questions involved in this paragraph up to the last clause on which the Government desires to make no contest, having accepted adverse decisions of lower courts. For instance, the case of *United States* v. *Ross* (*supra*) held that the clause "whether filled or unfilled, and whether their contents be dutiable or free" applies only to the preceding enumeration and does not include filled pint bottles. The Ross case refers to another such settled point, viz, whether "vials" in paragraph 88 includes bottles. It is difficult to understand why, as the act itself attaches to the word "vials" the pint measure of capacity, pint bottles are not included. But the Grace case decided that *empty* pint bottles were dutiable under the final clause of paragraph 88 and not as vials under the previous clause. It will be observed that the court in the Ross case erroneously stated that the Grace case held that pint bottles were dutiable as "vials."

It is thus no longer pertinent to contend that, while vials usually mean very small glass containers, that implication as to their size is repelled by the pint measure of capacity which the law imposes on the term, because the distinction of the courts, accepted by the Government, is that "vials" does not include bottles, since the former term is more generally understood to

be a kind of bottle used principally by druggists and chemists. (Grace case *ut supra.*)

We come, then, to the last clause of paragraph 88, which imposes a duty of 40 per cent ad valorem on all other plain, etc., and flint and lime glassware. There can be no doubt that this provision covers bottle glassware. The Board of General Appraisers in G. A. 2952 decided that the term "glassware" in paragraph 88 included *only* bottle glassware. However that may be, bottles are certainly covered by this general catch-all clause of that paragraph which refers particularly to bottles. In G. A. 2952 the board thought that Congress did not intend that pint bottles, etc., were to be subject to the same rate of duty when imported filled as if imported unfilled. But while they held that the bottles there were entitled to free entry, this seems to have been because the contents were subject to a specific duty, and the board by no means decided that bottles imported filled are not subject to duty. This is evident from their decision in the present case, which relied upon G. A. 3964. There the merchandise contained in the bottles was entitled to free entry, but regarding the bottles, the Board say that the Grace case "decided that such bottles when imported empty were dutiable at 40 per cent ad valorem under the last clause of paragraph 88, act of 1894;" that the Dickson case decided that bottles were excluded from the provisions of section 19 of the customs administrative act. "Hence we hold that inasmuch as said bottles are articles of merchandise *expressly provided for in paragraph*

88, *act of 1894*, they are subject to duty at 40 per cent ad valorem thereunder, it not being deemed material by us whether they were imported filled or empty."

We submit the argument on the final portion of paragraph 88 to the court, because the Government's position properly is that such bottles are necessarily dutiable under one of the two provisions of law which have been invoked, and are not entitled to free entry. The assignment of errors below shows that the Government challenged the circuit court's decision that paragraph 88 did not apply, and as the question of the circuit court of appeals presents section 19, and necessarily involves a discussion of the entire case, both paragraph 88 and section 19 are properly before the court in reaching the correct settlement of classification.

Opposing counsel argued below that the precise issue here involved was settled in *Merck* v. *United States* (99 Fed. Rep., 432). As we have pointed out above, there are inaccuracies in the report of that case, and apparently a mistaken conception by the court of other cases, which leaves it as a dubious authority. This dubiousness has a bearing upon the Government's acquiescence therein, which quite possibly was intended to apply only to bottles holding more than 1 pint or containing free goods or goods subject to a specific duty, to which the syllabus incorrectly limits the case. At all events, the Government evidently considered its acquiescence in that case as not to be extended to other cases, for the appeal in the present case and three other cases heard with it was promptly directed and prosecuted soon thereafter.

III.

AS TO THE CLAIM THAT THE BOTTLES ARE EXEMPT FROM DUTY IRRESPECTIVE OF THE NATURE OR DUTIABLE VALUE OF THE CONTENTS.

Counsel conceded in the court below that filled bottles have commonly been subjected to a duty, but appeals to the Ross, Dickson, and Leggett cases as showing exceptions. We have sufficiently commented on those cases as presenting obvious distinctions and explaining the reason for the particular exception, and contend that in the intent of Congress filled bottles have always been subjected to duty unless the exception in the act was clear and specific. Counsel also conceded below that the coverings of merchandise dutiable at ad valorem rates have commonly been subjected to the same duty as their contents, but adds that this has not been so invariably, referring to section 7 of the tariff act of 1883. Nevertheless, this rule has generally been in force, was finally established in the customs administrative act, and the tariff act of 1894 consequently omitted the provision of the act of 1883.

The case, then, comes down to this: While vague and doubtful interpretations of taxing laws are to be resolved in favor of the citizen, this principle does not mean that in a tariff act recognizing in large measure the protective principle as well as providing for revenue necessities, with duty schedules and a free list generally following prior laws, notwithstanding various changes in details, articles ordinarily taxed may escape

all duty simply because there is some doubt which of two provisions for duty attaches to them. While we do not contend that an article not provided for at all is not entitled to free entry simply because it is not enumerated in the free list, yet we do say that Congress uniformly places in the free list all articles which it manifestly intends shall not pay duty, and that the presumption that an article is free ought not to carry a claim very far unless the presumption is fortified by sound and strong reasons. As a rule, bottles have been specifically dutiable in our tariffs, whether they were filled or unfilled, and as a rule the usual coverings of ad valorem goods have been dutiable, as much as the unusual coverings of any goods. This statement presents accurately the scope and purpose of all our tariff laws on the present subject. When Congress has wished to exempt certain filled bottles, they have done so explicitly, as in the case of ginger ale and still wines under the act of 1894; and the lower courts have construed the law so as to relieve bottles covering free goods, or bottles covering goods specifically dutiable—a result not clearly justifiable, although accepted by the Government. Under these circumstances it is difficult to perceive why filled bottles of the dimension presented, containing ad valorem goods, are entitled to free entry. The Government submits that the claim is irresistible that the last portion of paragraph 88 seizes them, whether they are filled or unfilled; for, as stated, when Congress wishes to exempt filled bottles it does so plainly; or else that section 19

of the customs administrative act seizes them, especially since the inference from that section has been used by the courts to justify the escape from duty when the goods were not ad valorem—that is, when they were subject to specific duty or free.

It is to be remarked that the question of the circuit court of appeals is general and applies to bottles holding more than 1 pint as well as to those holding 1 pint or less. As to the larger bottles, there can not be the slightest doubt that the first portion of paragraph 88 clearly and specifically embraces them, and this, because more specific as to such bottles, excludes the application of section 19. The importers have necessarily accepted this result under decisions of the board and the courts. The point is too clear for argument, and accordingly in G. A. 2952, *ante*, holding certain bottles entitled to free entry, the board state that the words "whether filled or unfilled," etc., apply to all of the enumerated articles preceding the same. And in *Merck* v. *United States* (99 Fed. Rep., 432) Judge Townsend's statement as to the importer's admission of dutiability evidently refers to bottles holding more than 1 pint. (See also *United States* v. *Ross*, 91 Fed. Rep., 108.)

Opposing counsel relies upon the Dickson case as declaring with a broad implication that when the customs administrative act was passed Congress was not ignorant of the fact that bottles were already, except when specially exempted, specifically dutiable. Having thus, satisfactorily to himself, avoided the

application of section 19 to these coverings, he then proceeds to argue and maintain that while many other bottles may be specifically dutiable, this particular class of bottles is not. What the Government urges is that these bottles are either specifically dutiable under the last portion of paragraph 88, or else dutiable as coverings under section 19 of the customs administrative act, and that any doubt as between these provisions does not warrant their escape from duty.

What these bottles contained does not appear in the record here or below, but the Government concedes that the present argument is not applicable to any such bottles which may have contained ginger ale. (Par. 248.) Probably the same concession should be made in case any bottles contained still wines, etc., provided for in paragraph 244.

I therefore submit that the question of the circuit court of appeals should be answered in the affirmative; or, if answered in the negative, that this court should, in addition to such answer, instruct that court that the goods in question are to be classified under the concluding clause of paragraph 88. I submit that in either event the decision of the circuit court that such bottles are exempt from duty, irrespective of the nature or dutiable value of their contents, should be reversed.

HENRY M. HOYT,
Assistant Attorney-General.

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No. 249.

Brf. of Comstock for Appellees

SUPREME COURT U.S.
FILED
MAY 3 1902
JAMES H. MCKENNEY,
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Filed May 3, 1902.

Supreme Court of the United States.

OCTOBER TERM, 1901.

THE UNITED STATES,
Appellant,
vs.
AUSTIN, NICHOLS & CO.,
Appellees.
No. 249.

Original

Brief for the Appellees.

ALBERT COMSTOCK,
Counsel for Appellees.

C. G. Burgoyne, Walker and Centre Streets, N. Y.

Supreme Court of the United States,

OCTOBER TERM, 1901.

THE UNITED STATES,
Appellant,

vs.

AUSTIN, NICHOLS & Co.,
Appellees.

No. 249.

BRIEF FOR THE APPELLEES.

The question certified by the Circuit Court of Appeals being simply: *whether or not certain filled bottles should, under the tariff laws in force in 1896, be added to the value of their contents to make up the dutiable value of the latter*, it is conceived that this court will be content to answer that question only, without proceeding to instruct upon points as to which the court below has not certified, and hence probably does not entertain, any doubts. In that view, much of the brief for the Appellant is believed to be irrelevant, but will be answered because made.

Section 19, Administrative Act.

On the precise question certified, I think the answer must be *negative*, for several ample reasons, viz.:

1. Coverings of dutiable merchandise are not, *prima facie*, dutiable, but are free. It requires no statutory exemption to make them (or anything else) free,

but only on distinct provisions of law do they become dutiable. When merchandise is made dutiable according to its value, it is no sounder a *prima facie* assumption that its value is to be reckoned to include that of its coverings, then that a weight duty should be reckoned on the gross weight of goods and coverings.

Oberteuffer vs. Robertson, 116 U. S., 499.
Karthaus vs. Frick, Taney, 94.

The inclusion of coverings in reckoning value is purely a matter of statutory enactment. The opposite conception seems to pervade Appellant's brief, for on pages 6, 9 it is suggested that specific exemptions may make certain filled bottles free; that the form of the statute accounts for the claim that some of them are free, etc.

2. The only statutory provision existing in 1896, and warranting any assessment of duty on the coverings of merchandise, as such, was the "Customs Administrative" law of June 10, 1890, which required that *ad valorem* duties should be calculated on a valuation of merchandise including its coverings.

3. This statute did not refer to nor include *glass bottles* as such coverings, for when it was enacted, filled bottles were already the subject of express provisions of law for their taxation, in all sizes and qualities, in all conditions of fulness and emptiness, and whatever the nature of their contents, when full (Par. 133, 134, 136, Tariff act of 1883). These provisions the Administrative act did not purport to repeal or supersede, but they were afterward superseded by the Tariff act of October 1, 1890, which contained equally full and precise enactments as to the duty on all filled (and on empty) glass bottles (Par. 103, 104). In view of this continuity of special provisions, and of the very long existence of the same system (at least from 1861 to the present), in continuous operation

side by side with the successive provisions for the exaction of duty on the coverings of *ad volorem* goods (pp. 8,9, Appellant's brief), it is impossible to hold that *filled bottles* ever were, or could have been, subject to the operation of these latter provisions, or specifically to that of Section 19 of the act of June 10, 1890. With entire confidence it may be stated that until after the Tariff act of 1894, executive practice never treated them as so subject, but they were steadfastly recognized and assessed with duty under the provisions for filled bottles in paragraphs 103-04, Act of 1890, and when this was challenged by importers the Government successfully defended the practice in the courts.

Marine vs. Packham, 52 Fed. Rep., 579 (C. C. A.).
In re Salomon, 55 Fed. Rep., 285.

When the Tariff act of 1894 took effect, its provisions for duty on filled bottles were found very incomplete, and the Government to some extent resorted to the practice of assessing duty on them under Section 19 of the Administrative act of 1890. But this practice was repeatedly declared illegal by the courts. In

U. S. vs. Dickson, 73 Fed. Rep., 195 (C. C. A.),

the court clearly ruled that Sec. 19 had no reference to glass bottles as coverings, for the reasons hereinabove stated, and therefore could not be resorted to when, for any reason, duty could not be charged on filled bottles under other provisions. In

Smith vs. U. S., 91 Fed. Rep., 757,

it was again asserted that filled glass bottles could not be subjected to Section 19, but that glass jars, not being bottles, could be. In

Merck vs. U. S., 99 Fed. Rep., 432,

it was for the third time decided that Section 19 was not applicable to filled glass bottles imported under the Tariff act of 1894.

Manifestly, even without these rulings, a law enacted in 1890, and taking effect in that year, during the life of a Tariff act which fully provided for all filled bottles and which it did not repeal, could not be extended to affect such bottles four or six years later, and after the entire life of an intervening Tariff which also fully provided for them, merely by an omission in a still later law, whereby certain sizes of filled bottles were left unprovided for.

It is true that in the Dickson case, as pointed out on page 6 of Appellant's brief, the appellate court asserted that bottles may ordinarily be considered and treated as coverings. But the decision at once proceeded to assert that, in view of the course of legislation, they were not a sort of coverings to which the administrative act could be held applicable. Appellant's counsel, on page 7, brief, inadvertently misstates the reasoning of this Dickson case. It did not hold, "in effect, that to add the value of the bottles to the value of the goods, under Section 19, was assessing an additional duty in the face of the prohibition in paragraph 248." It *might* have so held, and thus disposed of the case, and its very importance is that the court chose other reasoning. It held that neither additional *nor any other* duty could be assessed under Section 19, *because the coverings were glass bottles, and hence not within the operation of Section 19 at all.* Of course, the impotency of the section affects as well its reference to "expenses incident to placing the merchandise in condition," etc., as any other part, and this disposes of the suggestion at foot of page 7 of the opposing brief.

Hence, it seems evident that whatever may have been the dutiable or free character of the small filled bottles herein involved, they were in no event subject to Section 19, and the referred question **must therefore be answered in the negative.**

Paragraph 88, Act of 1894.

But the Appellant seeks to go beyond the question, and to have this court instruct that below, on the entire subject of the tariff character under the laws in force in 1896, of small glass bottles, under one pint capacity, imported filled with merchandise subject to *ad valorem* duties. Reiterating that this, as I contend, is not a labor devolved on this court, and should not be gratuitously undertaken, I think that if it be undertaken, the court must then conclude, as did the circuit court, that no duty was leviable on such bottles. To this conclusion I am guided as follows:

1. Duties are not to be exacted on a doubtful condition of the law.

U. S. vs. Wigglesworth, 2 Story, 369.

(And see Appellants' brief, p. 14.)

2. Duties are not leviable on coverings on general principles, but only by express enactment.

Cases and argument, *supra.*

3. The act of 1894 was not one "recognizing in large measure the protective principle" (Appellant's Brief, p. 14), but was notoriously a low tariff, aimed rather for revenue than for protection (see its title).

4. Its provision as to bottles (and similar glassware, Par. 88) clearly did not provide for assessing duty on small ones, imported as coverings or containers. On the reasons for this there is no light; whether it was a *casus omissus*, or whether pursuant to the congressional intent, but on the plain meaning of its words, and on their repeated judicial construction, the law laid the duty on large bottles both as coverings (when filled)

and as merchandise (when empty), but on small ones only as merchandise (see 91-757).

Grace vs. Collector, 79 Fed. Rep., 315 (C. C. A.).
U. S. vs. Ross, 91 Fed. Rep., 108 (C. C. A.).
Smith vs. U. S., 91 Fed. Rep., 757.
U. S. vs. Merck, 99 Fed. Rep., 433.

The Merck case is especially pointed out, because it determined, in 1899, the precise controversy now here, and was duly acquiesced in on the advice of the Attorney-General, on January 16, 1900. The comments found on page 13 of Appellant's brief, as to this decision and acquiescence, are somewhat disappointing. I had hoped that at least one result of the present certificate would be a clear exposition from the Attorney-General's office as to why the Merck decision was accepted, yet that in the present case appealed. But nothing better is offered than vague conjectures as to what such course may have quite possibly intended, with a suggestion that the purport of the ruling was doubtful, which a perusal of it scarcely bears out. Despite these decisions, the Appellant contends (pp. 12, 13, brief) that the final clause of Par. 88 may be taken to provide a duty of 40 per cent. on small filled bottles. Manifestly, if so, that duty would apply as well on such bottles when their contents were free, or dutiable at specific rates, as when dutiable *ad valorem*. Yet Appellant concedes that in these conditions small filled bottles were not dutiable under Par. 88 (brief, p. 7). And his contention, on page 14, that filled bottles have always been somehow dutiable, "unless the exception in the act was clear and specific," amounts substantially to a concession of all I maintain, for the exception in Par. 88 to provide any duty for small filled bottles is very clear under the rule, "*expressio uniis est exceptio alterius.*" The argument on page 15 develops this same view, for the very point on which this issue is raised and was sustained by the circuit court, is that in the Act of 1894 Congress departed

from its time-honored course of fully providing for all filled bottles, and by wholly omitting to provide for the small ones, made it illegal to exact duty on them.

Even were these rulings less numerous or less manifestly right, it would be deplorable to vitiate them now, for they were severally accepted by all concerned (Appellant's brief, pp. 7, 11, 13), and in their light the Act of 1894 was applied until succeeded by that of 1897.

Under these circumstances the attempt of the Appellant to resort to the alleged *joint* effect of Section 19, Administrative act, and Paragraph 88 of the Tariff of 1894, while readily understood, cannot avail.

It will not do for the Government to occupy the attitude of asserting that Section 19 provides for the bottles because Paragraph 88 does not, but that Paragraph 88 provides for them because Section 19 does not.

Each provision must be scrutinized by itself, to learn whether it applies, and so scrutinized, neither is found applicable to the bottles in suit. Hence there was no provision for their assessment, and they were entitled to be entered free.

No argument for imposition of a duty on these bottles of less than one pint capacity, filled with various merchandise, can be derived or inferred from the prohibition against a duty on bottles filled with ginger ale (Par. 248), for said prohibition may well have been intended to prevent the exaction on such bottles of over one pint, which I fully concede would otherwise be dutiable, filled or empty.

The Form of the Protest.

The evil of inviting this court to assume labors not devolving on it, is well illustrated in this case by Appellant's contention (pp. 2, 3, Brief), that the Board of Ap-

praisers was warranted, under the protest, in deciding that the bottles in suit should be reliquidated at 40 per cent. The brief insists that this rate was one of, those alternatively claimed on the bottles in suit. It is hardly thought that this court will care to consider that question, yet should it do so, the facts are plain. The importer's right to protest only so far as he chooses, is indisputable. And in this case he chose to stand for 40 per cent. duty only on "such of said articles as have been assessed with a duty amounting to more than 40 per cent. *ad valorem*," and plainly so restricted his protest *(vide* Appellant's brief, p. 2). As to *such* only, did he claim that if *(they)* were not free, or dutiable as aforesaid (*i. e.*, at various lower rates), *they* were dutiable only at 40 per cent., etc. When the Board, ruling on this protest, directed the Collector to reliquidate at 40 per cent. bottles which had been assessed with a *less* amount, it plainly exceeded its powers and passed upon an issue not before it. And the Appellant now asks this court to do likewise. No part of the importers' claims was sustained by the Board, and Appellant's suggestions of a query as to their right to appeal is therefore without foundation.

ALBERT COMSTOCK,
Attorney and Counsel for Appellees.

Albert Comstock

Supreme Court of the United States.

No. 249.—October Term, 1901.

The United States, Appellant, vs. Austin Nicholls & Company. } On certificate from the United States Circuit Court of Appeals for the Second Circuit.

[June 2, 1902.]

This case came before the Court of Appeals upon appeal from a decision of the Circuit Court for the Southern District of New York, reversing a decision of the board of general appraisers, which affirmed the action of the collector of the port of New York regarding the assessment of duty upon certain imported merchandise. The Circuit Court of Appeals, being in doubt with regard to a certain question of law arising therein, desired the instruction of the Supreme Court for its proper decision.

The importation was made under the tariff act of 1894, and consisted of glass bottles, holding not more than one pint, and filled with goods dutiable at *ad valorem* rates. Upon these facts the question of law concerning which the instruction of this court was desired was this:

"Should the value of the bottles filled with *ad valorem* goods be added to the dutiable value of their contents, under section 19 of the customs administrative act of 1890, to make up the dutiable value of the imported merchandise?"

Mr. Justice Brown delivered the opinion of the Court.

This case involves the dutiable classification of certain glass bottles either under the customs administrative act of 1890, or the tariff act of 1894. The statement of facts shows that the bottles in question held not more than one pint, and were imported filled with merchaudise, which was liable to *ad valorem* duties, and that they were assessed for duty at the respective *ad valorem* rates applicable to their contents as a part of their value. The protest (referred to by counsel, though no part of the record) claimed that the articles were free from duty, or, failing that, were dutiable at 40 per cent *ad valorem* under paragraphs 88, 89 or 90 of the tariff act of 1894.

Section 19 of the customs administrative act, (26 Stat. 131, 139,) provides that "whenever imported merchandise is subject to an *ad valorem* rate of duty . . . the duty shall be assessed upon the actual market price or wholesale price of such merchandise, . . . including the value of all cartons, cases, crates, boxes, sacks and *coverings* of any kind, and all other costs, charges and expenses," &c.

At the time this act was passed the following provisions of the tariff act of 1883 were in force, (22 Stat. 488, 495):

"Green and colored glass bottles . . . not specially enumerated or provided for in this act, one cent per pound; if filled, and not otherwise in this act provided for, said articles shall pay thirty per cent. *ad valorem* in addition to the duty on the contents."

By the same act "flint and lime glass bottles and vials, . . . not specially enumerated or provided for in this act," were taxed at forty per centum *ad valorem*. "If filled, and not otherwise in this act provided for, . . . forty per centum *ad valorem* in addition to the duty on the contents."

Though the tariff act of 1883 is not directly in issue in this case, it is pertinent to inquire whether the sections above cited respecting duties upon glass bottles were repealed by section 19 of the customs administrative act. We are of opinion that they were not. The customs administrative act was not a tariff act, but, as its title indicates, was intended "to simplify the laws in connection with the collection of the revenues," and to provide certain rules and regulations with respect to the assessment and collection of duties, and the remedies of importers, and not to interefere with any duties theretofore specifically imposed or thereafter to be imposed, upon merchandise imported. Section 19 was intended to provide a general method for the assessment of *ad valorem* duties, and to require the value of all cartons, cases, crates, boxes, sacks and coverings of any kind to be included in such valuation. We think the rule *ejusdem generis* applies to the words "coverings of any kind," and that glass bottles, which are never in ordinary parlance spoken of as coverings for the liquor contained in them, is such a clear departure from the preceding words as to exempt them from the operation of the section, provided at least they are taxed under a different designation. It is very singular that if Congress intended to include under the words "coverings of any kind" vessels used for containing liquors, it should not have made use of the words casks, barrels, hogsheads, bottles, demijohns, carboys, or words of similar signification. The inference is irresistible that by the words "coverings" it only intended to include those previously enumerated and others of similar character used for the carriage of solids and not of liquids. Webster defines a covering as "anything which covers or conceals, as a roof, a screen, a wrapper, clothing," &c.; but to speak of a liquid as being *covered* by the bottle which contains it, is such an extraordinary use of the English language that nothing but the most explicit words of a statute could justify that construction.

So, too, by cartons, cases, crates, boxes and sacks, we understand those encasements which are not usually of permanent value, and such as are ordinarily used for the convenient transportation of their contents.

Indeed, it is quite possible that they were made taxable in a general way by the customs administrative act, in order that, if they were so made as to be of further use after their contents were removed, they might not escape taxation. The ordinary cartons, cases, crates, boxes and sacks are of no value after their contents are removed, but in order that they should not escape taxation altogether, if they were of permanent value, they were included in the general terms of the customs administrative act.

The subsequent legislation upon the same subject tends to show that Congress intended to preserve the distinction between bottles and ordinary coverings, and to make a special provision for them. Thus, by the tariff act of October 1, 1890, (26 Stat. 567, par. 103,) "green and colored, molded or pressed, and flint and lime glass bottles, *holding more than one pint*, . . . and other molded or pressed green or colored and flint or lime bottled glassware not specially provided for in this act, one cent per pound," while those *not holding more than one pint* were taxed at fifty cents per gross, and by paragraph 104, "if filled, and not otherwise provided for in this act, and the contents are subject to an *ad valorem* rate of duty, the value of such bottles . . . shall be added to the value of the contents for the ascertainment of the dutiable value of the latter; but if filled . . . and the contents are not subject to an *ad valorem* rate of duty . . . they shall pay, in addition to the duties on their contents, the duties prescribed in the preceding paragraph." It will be noticed that by this act there was a division, theretofore unrecognized, between bottles holding *more* than one pint and those holding *less* than one pint, but both classes were specifically taxed, whether filled or unfilled; consequently the question arising in this case as to the rate of duty payable, if the administrative act were not applied, would not arise under the act of October 1, 1890.

In 1894, the tariff was again revised, (28 Stat. 508,) and by paragraph 88 "green and colored, molded and pressed, and flint and lime glass bottles holding *more* than one pint, . . . *whether filled or unfilled*, and whether their contents be dutiable or free," "were taxed at three-fourths of one cent per pound, and vials, holding *not more* than one pint and not less than one-quarter of a pint, forty cents per gross; all other plain, green and colored, molded or pressed, and flint and lime glassware, forty per centum *ad valorem*." By paragraph 248 of the same act ginger ale or ginger beer was taxed at twenty per centum *ad valorem*, but no separate or additional duty were assessed on the bottles. By paragraph 244, imposing duties upon still wines, there was a proviso that "no separate or additional duty shall be assessed on the bottles;" and by paragraph 245 a like provision was made with regard to ale, porter and beer in bottles.

It will be observed that by paragraph 88 a duty was imposed upon bottles holding more than one pint, whether *filled or unfilled*, but upon vials hold-

ing less than one pint there was, probably by mistake, no provision that they should pay duty *if filled;* hence arises the contention of the defendants in this case, that if filled, they are either free of duty, or fall under the last clause of paragraph 88, and are dutiable at only forty per centum *ad valorem.*

The construction of these paragraphs in connection with the administrative act of 1890 has been considered in several of the lower courts, and a conclusion generally reached that where a special provision was made for a particular kind of covering, the administrative act did not apply. Thus in *United States* v. *Dickson,* (73 Fed. Rep. 195,) it was held that in assessing duty on ginger ale in bottles under paragraph 249 above cited, the provision that no additional duty shall be assessed on the bottles prevented the collector from adding the value of the bottles to the value of the ale, upon the ground that they were coverings. The case was put upon the ground that Congress had legislated for bottles, *eo nomine,* as a separate subject of duty. The decision was by the Court of Appeals of the Second Circuit, and affirmed the decision of Judge Townsend, (68 Fed. Rep. 534,) and also a decision by Judge McKennan in *Lelar* v. *Hartranft,* (33 Fed. Rep. 242,) which, however, was decided before the customs administrative act. As bearing upon the same subject see *United States* v. *Leggett,* (66 Fed. Rep. 300.) In *United States* v. *Ross,* (91 Fed. Rep. 108,) it was held that glass soda bottles holding less than one pint, and which constitute the usual and necessary coverings of soda water imported therein, are not dutiable under the act of 1894. In *Merck* v. *United States,* (99 Fed. Rep. 432,) it was held that bottles holding not more than one pint of free goods and those subject to a specified duty were free; and that bottles holding (not?) more that one pint of merchandise subject to an *ad valorem* duty are not themselves subject to duty. The customs administrative act seems to have been regarded by Judge Townsend as having nothing really to do with the question.

The question certified does not require us to determine whether the bottles in question are subject to a duty under section 88 of the tariff act of 1894, or any other section, but merely whether the value of the bottles, filled with *ad valorem* goods, should be added to the dutiable value of the contents under section 19 of the customs administrative act. The large number of cases which have arisen under the tariff acts with respect to the proper clasification of glass bottles show that in the mass of legislation upon that subject it is difficult to evolve a construction appliable to all such cases, or to determine what particular provision of the glassware sections shall be applied; but it is sufficient to say that where such elaborate provisions are made for a specific tax on glass bottles, whether filled or unfilled, and whether their contents be subject to *ad valorem* or specific duties, it was not intended that the general word "coverings," used

in the customs administrative act, which, as before observed, is not a tariff act at all, was intended to supply any deficiency that might exist in the tariff act with respect to those articles.

We have no doubt that the customs administrative act applies to coverings generally, but we think that in view of the several sections of the act of 1894 upon the subject of glass bottles Congress must have intended the words "coverings of any kind" should not apply to them, but that the other sections must be looked to exclusively to determine their rates of duty. As we are not called upon to determine that rate in this case, but only to instruct the court whether the administrative act applies to this case, we answer the question certified in the negative.

True copy.

Test:

Clerk Supreme Court, U. S.